IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 27 OF 2007

Bernardo Rafael Fernandes,
R/o House No.1257, Bondir,
Santa Cruz, Ilhas, Goa. ... Applicant

Versus

1. The State of Goa,
through the Old Goa
Police Station, Old Goa.

2. Berta Maria Piedade Fernandes,
R/o House No.212/E, Alto
Santa Cruz, Vasudha Colony,
Santa Cruz, Ilhas, Goa. ... Respondents

Mr. Ryan Menezes, Advocate for the Applicant.

Mr. R. S. Sardessai, Advocate for the Respondent No.2.

CORAM : N. A. BRITTO, J.

DATE : 6TH JULY, 2007.

ORAL ORDER

Heard learned Counsel on behalf of both the parties.

2. This revision application is filed by the first informant (complainant, for short) against the order of acquittal of the accused under Sections 341 and

448 I.P.C., by Judgment dated 20-2-2006 of the learned J.M.F.C., Panaji.

3. The complainant's wife is the sister of the accused. The complainant, who at the relevant time was a Superintendent of Police, filed a complaint dated 12-9-2000 alleging that he was the owner in possession of the ground floor/basement of a house situated in plot no.126 (in survey no.19/2) at St. Cruz and that when he went to the said premises on that day he found that the lock put by him was removed and some other lock was put to the said basement and while he was looking at the lock the accused who resides on the upper floor and against whom he had filed a Civil Suit came down and told him not to break the lock as she had put it and that he should go and lodge a complaint or do whatever he wanted. The complainant also stated that the said premises were leased by the complainant to Fr. Freddy Da Costa. The said Fr. Freddy was later on examined in the trial as PW2 but whose examination-in-chief could not be completed on account of his death. The complainant had stated that after he vacated the said premises, the key of the same was handed over to the complainant on 16-8-2000.

4. The complaint was investigated and a charge-sheet filed, and in the course of the trial, five witnesses were examined by the prosecution.

5. The case of the accused was that she was the owner in possession of the entire building having purchased the same by virtue of the sale deed

dated 27-1-1995. The said sale deed is between the complainant and his wife on the one hand, and the accused and her husband, on the other hand.

6. The learned trial Court, in acquitting the accused under Sections 341 and 448 I.P.C., interalia observed, that the act of the accused of replacing the lock of the basement premises and the preparation made by her to give it out on lease by publishing an advertisement in the newspaper did not amount to an act of criminal trespass or house trespass. The learned trial Court also observed that the orders of the Civil Court and the appellate Court show that the accused had made out a better case in respect of the possession of the basement premises and therefore proceeded to acquit the accused.

7. Although, the case was filed by the State, as complainant, it has chosen not to file an appeal against the acquittal of the accused but it is the complainant who has filed this revision petition which, as per Mr. Ryan Menezes, the learned Counsel on behalf of the applicant, can be entertained by this Court in the light of the law laid down by the Apex Court in **Pratap** v. **State of U.P.**(AIR 1973 SC 786). The learned Counsel on behalf of the complainant submits that the learned trial Court has not at all considered that it is the complainant who was in possession of the basement, after the lease given to Fr. Freddy Da Costa had ended and in such a situation the accused could not have interfered with the possession of the complainant by taking law in her own hands. The learned Counsel therefore submits that the case be remanded, if not for retrial, at least to direct the learned trial Court to give a finding of possession

which finding would flow from the facts stated by the complainant and other witnesses and which aspect has not at all been considered by the learned trial Court.

8. On the other hand, Mr. R. S. Sardessai, the learned Counsel on behalf of the accused, has submitted that the case of the accused was based on her plea that she was the owner in possession of the said basement pursuant to the sale deed dated 27-1-1995, and therefore the accused could not be convicted for criminal trespass. Mr. Sardessai has placed reliance on the case of **State of Goa** v. **Pedro Lopes** (1996 CRI.L.J. 256) wherein this Court observed that in order to sustain a prosecution under Section 447 – Criminal trespass, "it should be established before the Court that the complainant is entitled to have an unquestionable possession of the property in exclusion of the entire cleared(sic. world) at the time of trespass".

9. As far as a revision petition by a complainant against an acquittal is concerned, the law is well settled. The Apex Court in **Kaptan Singh and others** v. **State of M.P. and another**(1997(4) Supreme 211) has held that the revisional power of the High Court while sitting in Judgment over an order of acquittal should not be exercised unless there exists a manifest illegality or there is grave miscarriage of justice. In my view, there is none in this case.

10. There is hardly any dispute as to facts. Broadly stated the complainant purchased the plot by sale deed dated 1-3-1988 and constructed a

building including the said basement regarding which he obtained an occupation certificate on or about 2-3-1990. The complainant let out the basement premises to Fr. Freddy Da Costa from 1-8-1990 to 16-8-2000 when Fr. Freddy Da Costa handed over the possession of the basement premises to the complainant.

11. Thereafter, there was a sale deed between the complainant and his wife on one hand and the accused and her husband on the other hand, dated 27-1-1995. A copy of this sale deed was not produced by the complainant or for that matter by the accused before the trial Court and a copy of the same has been produced at the time of the hearing of this revision petition by the learned Counsel on behalf of the accused. However, there is no dispute that the complainant and his wife filed a Civil Suit bearing No.21/1997/B on or about 24-1-1997 for rectification of the sale deed. As per the said sale deed dated 27-1-1995 between the complainant and his wife and the accused and her husband the former conveyed to the accused and her husband the plot and the entire building with the recital that they were entitled to enter upon and occupy or possess and enjoy the said land and premises, etc. and receive the rents, issues and profits thereof, etc. for their own use and benefit, etc. After the execution of the said sale deed dated 27-1-1995 and during the pendency of Special Civil Suit No.21/1997/B filed by the complainant and his wife against the accused and her husband that the accused published an advertisement, as stated by PW4, for letting out the basement premises, and that too after the accused had replaced the lock of the said basement. Presumably after the complainant

came to know of the said advertisement that on 12-9-2000 that the complainant went to verify the possession and found the lock put by him replaced by the accused. In the said Special Civil Suit filed by the complainant and his wife, the accused and her husband, inter alia, pleaded that they had purchased the said plot and if at all the plaintiffs(complainant and his wife) had executed the sale deed in their favour the same was done as agents of the defendants(accused and her husband). The defendants(accused and her husband) further stated that the entire financing for the purchase of the land and the construction of the bungalow was done by them. In the said Civil Suit filed by the complainant and his wife, applications for temporary injunctions were filed by them. The first was CMA 17/1997 which was dismissed holding that the plaintiffs had failed to make out a prima facie case for rectification of the sale deed and to restrain the defendants from acting on the basis of the sale deed in their favour. CMA 277/1997 was dismissed by Order dated 16-2-1999. The said application was filed to restrain the said defendants from carrying out any construction in the suit property, as the said defendants had constructed a small room in the open space in survey no. 19/2. Appeals against the said orders dated 16-2-1999 were filed before the District Court and were dismissed by a common order of the learned District Judge dated 22-10-1999.

12. In addition to the FIR filed by the complainant, it appears that proceedings under Section 145 of the Code were initiated before the learned SDM and it has been submitted by Mr. Sardessai, the learned Counsel on behalf of the accused that the said proceedings were kept in abeyance in view of the

pendency of the said Civil Suit.

13. The learned trial Court in acquitting the accused, inter alia, has observed that it is the case of the accused that the basement premises belonged to her. The learned Counsel, on behalf of the complainant, contends that the question before the trial Court was not as to whom the basement belonged to but whether it is the complainant who was in possession of the same regarding which no finding has been given. The learned trial Court has also observed that the orders of the Civil Court and those of the appellate Court, at prima facie stage, show that the claim of the complainant to basement premises was not established. The learned trial Court, as already stated, also observed that the act of the accused of replacing the lock of basement and preparation made by her to let it out by publishing an advertisement do not amount to an act of criminal trespass or house trespass. In my view, the said finding could not be faulted. It is quite probable that the complainant was in possession of the said premises from the time the complainant had let them out to Fr. Freddy Da Costa till the latter handed over their possession to the complainant on 14-8-2000 but if at all the accused entered into the possession of the said basement premises and subsequently advertised the said premises to be let out, she did it pursuant to the deed dated 27-1-1995 by which possession as well as ownership was conveyed to her and her husband. The accused had claimed ownership as well as possession of the basement area pursuant to the said deed. Even otherwise, in a given case, the Court can consider the plea of the accused, even if the accused has not taken it, if the same is available to be considered from the

material on record. The offence of criminal trespass is defined in Section 441 of I.P.C. That Section enacts that whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having unlawfully entered into or upon such property unlawfully remains there with that intent is said to have committed criminal trespass. To establish criminal trespass, the prosecution must prove that the real or dominant intention was to commit an offence or to intimidate, insult or annoy the occupant of the property. Here the accused entered the property asserting a bona fide claim of right pursuant to the said sale deed and therefore it could not be said that her real or dominant intention of taking possession of the basement was with a view to commit any offence or to intimidate, insult, annoy, etc. On facts, it could not be said that the action of the accused in taking possession of the basement was an afterthought or a cloak to exercise a right she did not have. To repeat her primary and dominant intention was to assert her right under the sale deed. In other words, the accused entered the possession of the basement premises pursuant to a bona fide claim of right under the said deed and whilst exercising such claim of right, the accused could not have been said to have committed any offence of criminal trespass. Therefore there was no necessity of any finding of possession being given by the trial Court.

14. In the light of the above, I find there is no merit in this revision application. Consequently, the same is hereby dismissed.

15. The observations made herein will certainly not come in the way of the disposal of the Civil Suit which is bound to be disposed of on its own merits.

N. A. BRITTO, J.

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